FISCAL NOTE OFFICE OF STATE HUMAN RESOURCES (OSHR)

RULE CONTACT PERSON: Nancy Lipscomb, <u>nancy.lipscomb@nc.gov</u>, 919-807-4804

RULEMAKING COORDINATOR: Shari Howard, shari.g.howard@nc.gov, 919-807-4881

PROGRAM AFFECTED: State Human Resources Commission, Subchapter 1B, Title

25 and Employee Relations, Subchapter 1J, Title 25

STATUTORY AUTHORITY: G.S. CHAPTER 126

FISCAL IMPACT SUMMARY: State Government: Yes

Local Government: N/A Substantial Impact: No Federal Government: N/A Small Businesses: N/A

EFFECTIVE DATE: Upon conclusion of rulemaking process

RULES: 25 NCAC 01B .0350 TIME FRAME FOR RAISING

ALLEGATIONS OF DISCRIMINATION (AMENDMENT)

25 NCAC 01B .0413 EXERCISE OF COMMISSION

DISCRETION (AMENDMENT)

25 NCAC 01C.0311 REMEDIES OF EMPLOYEES OBJECTING

TO MATERIAL IN FILE (AMENDMENT)

25 NCAC 01H.1103 DENIAL OF VETERANS' PREFERENCE

(AMENDMENT)

25 NCAC 01J.0603 APPEALS (AMENDMENT)

25 NCAC 01J.0610 WRITTEN WARNING (AMENDMENT)

25 NCAC 01J.0615 INVESTIGATORY LEAVE (AMENDMENT)

25 NCAC 01J.0616 CREDENTIALS (ADOPTION)

25 NCAC 01J.0617 DISCRIMINATION AND RETALIATION

(ADOPTION)

25 NCAC 01J.0618 APPEAL OF DENIAL OF VETERANS'S

PREFERENCE (ADOPTION)

25 NCAC 01J.1101 UNLAWFUL WORKPLACE HARASSMENT

AND RETALATIATION (AMENDMENT)

25 NCAC 01J.1201 GENERAL PROVISIONS (REPEAL)

25 NCAC 01J.1202 AGENCY RESPONSIBILITIES (REPEAL)

25 NCAC 01J.1203 AGENCY GRIEVANCE REPORTS (REPEAL)

25 NCAC 01J.1204 DISCRIMINATION AND

RETALIATION/SPECIAL PROVISIONS (REPEAL)

- 25 NCAC O1J.1205 UNLAWFUL WORKPLACE HARASSMENT (REPEAL)
- 25 NCAC 01J.1206 TIME LIMITS (REPEAL)
- 25 NCAC 01J.1207 FINAL AGENCY ACTION (REPEAL)
- 25 NCAC 01J.1208 LEAVE IN CONNECTION WITH GRIEVANCES (REPEAL)
- 25 NCAC 01J .1301 MINIMUM PROCEDURAL REQUIREMENTS (REPEAL)
- 25 NCAC 01J .1302 GENERAL AGENCY GRIEVANCE PROCEDURE (ADOPTION)
- 25 NCAC 01J .1303 AGENCY AND UNIVERSITY GRIEVANCE REPORTS AND DATA ENTRY (ADOPTION)
- 25 NCAC 01J .1304 SETTLEMENTS/CONSENT AGREEMENTS IN GRIEVANCES, CONTESTED CASES (ADOPTION)
- 25 NCAC 01J .1305 OSHR REVIEW AND APPROVAL OF FINAL AGENCY DECISIONS (ADOPTION)
- 25 NCAC 01J.1306 BACK PAY (ADOPTION)
- 25 NCAC 01J .1307 FRONT PAY (ADOPTION)
- 25 NCAC 01J .1308 LEAVE (ADOPTION)
- 25 NCAC 01J .1309 HEALTH INSURANCE (ADOPTION)
- 25 NCAC 01J .1310 INTEREST (ADOPTION)
- 25 NCAC 01J .1311 REINSTATEMENT (ADOPTION)
- 25 NCAC 01J .1312 CAUSES FOR REINSTATEMENT
- 25 NCAC 01J .1313 SUSPENSION WITHOUT PAY (ADOPTION)
- 25 NCAC 01J .1314 DISCRIMINATION, HARASSMENT, RETALIATION (ADOPTION)
- 25 NCAC 01J .1315 VOLUNTARY PROGRAMS OR BENEFITS (ADOPTION)
- 25 NCAC 01J .1316 REMEDIES FOR PROCEDURAL VIOLATIONS (ADOPTION)
- 25 NCAC 01J .1317 REMEDIES: SALARY ADJUSTMENTS (ADOPTION)
- 25 NCAC 01J .1318 CERTAIN REMEDIES NOT AVAILABLE (ADOPTION)
- 25 NCAC 01J .1319 SITUATIONS IN WHICH ATTORNEY'S FEES MAY BE AWARDED (ADOPTION)
- 25 NCAC 01J .1320 ATTORNEY'S FEES MAY BE AWARDED AS A RESULT OF A SETTLEMENT (ADOPTION)
- 25 NCAC 01J.1401 MINIMUM PROCEDURAL REQUIREMENTS (REPEAL)
- 25 NCAC 01J.1402 FLEXIBILITY (REPEAL)
- 25 NCAC 01J.1403 INFORMAL MEETING WITH SUPERVISOR (REPEAL)

- 25 NCAC 01J.1404 MEDIATION PROCEDURE (REPEAL)
- 25 NCAC 01j.1405 CONCLUSION OF MEDIATION (REPEAL)
- 25 NCAC 01j.1406 LIMITATIONS ON A MEDICATION AGREEMENT (REPEAL)
- 25 NCAC 01J.1407 POST MEDIATION (REPEAL)
- 25 NCAC 01J.1408 EMPLOYEE RESPONSIBILITIES FOR MEDIATION (REPEAL)
- 25 NCAC 01J.1409 AGENCY RESPONSIBILITIES FOR MEDIATION (REPEAL)
- 25 NCAC 01J.1410 OFFICE OF STATE PERSONEL RESPONSIBILITIES (REPEAL)
- 25 NCAC 01J.1411 AGENCY PROCEDURAL REQUIREMENTS FOR EMPLOYEE MEDIATION AND GRIEVANCE POLICY (REPEAL)
- 25 NCAC 01J.1412 OFFICE OF STATE PERSONNEL RRESPONSIBILITIES FOR EMPLOYEE MEDIATION AND GRIEVANCE PROCESS (REPEAL)

(See Appendix for proposed rule text)

Office of State Human Resources (OSHR) CERTIFICATION OF REGULATORY PRINCIPLES: The rules covered by this Fiscal Note:

- are statutorily authorized and in the public interest,
- seek to reduce the burden on the regulated community,
- were written in a clear and unambiguous manner,
- are not unnecessary or redundant,
- considers the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed,
- are based on sound, reasonably available, relevant information,
- are designed to achieve the regulatory objective in a cost-effective, timely, and least burdensome manner.

RULE SUMMARY, NECESSITY, AND PURPOSE:

The proposed rule changes aim at bringing OSHR rules in line with two recent legislative changes:

- Session Law 2011-398 (SB 781), s. 44, which was effective as to contested cases filed on or after January 1, 2012, shifted the authority from the State Human Resources Commission (SHRC) to the Office of Administrative Hearings (OAH) to make final decision in contested cases arising under Chapter 126 of the General Statutes. Neither OSHR nor OAH adopted any rules subsequent to SL 2011-398, and OAH continued to apply the Commission's rules.
- Subsequently, the legislature passed House Bill 834 (S.L. 2013-382), resulting in changes to G.S. 126, the State Human Resources Act. Although it left the final decision in contested cases to rest with OAH, it changed other significant portions of the process applicable to contested cases, including the process applicable to grievances before they could be filed as contested cases. Specifically, OSHR was given review and approval authority by the legislature over agency/university final agency decisions in contested cases and contested cases were not permitted to be filed until OSHR reviewed and approved the final agency decision. This change applied to all cases filed after August 21, 2013.

As a result of these legislative changes, prior to January 1, 2012, cases were filed at OAH but the authority for final review and decision rested with the SHRC. This process is described in the current rules in Subchapter 1B, "The State Human Resources Commission," which reflect the authority the SHRC has for cases arising before January 1, 2012. After January 1, 2012, all grievances were decided by OAH with no input from either OSHR or the SHRC. After August 21, 2013, however, all grievances were decided by an Administrative Law Judge but only after the grievance went through the agency internal grievance process, which now includes OSHR approval at the Final Agency Decision level prior to being filed at OAH.

Subsequent to the passage of HB 834, the SHRC decided to amend its rules to deal with the changes resulting from both legislative changes mentioned above. However, a number of contested cases filed on or before January 1, 2012, have continued to come to the SHRC for the final decision under the old process; thus, it was necessary to retain the rules in Subchapter 1B for dealing with contested cases that reflected the authority the SHRC has for cases arising before January 1, 2012.

After the stream of cases prior to January 1, 2012 decreased, SHRC then determined that the substance of the 1B rules dealing with remedies in contested cases needed to be promulgated for application to post January 1, 2012 and post-HB 834 cases, and those rules are proposed to be adopted and placed in a section of Subchapter 1J. These rules (formerly 1B rules) have been "amended" in their adoption to clarify the conditions under which the awarding of credits, payments or other costs associated with settling and resolving contested cases are governed for cases after January 1, 2012.

The 1J rules were necessary to be adopted to reflect the authority OAH has for cases arising effective January 1, 2012, and after. There are some cases still pending at OAH which were filed

under these rules prior to January 1, 2012, and these rules, as amended, in Subchapter 1B, will continue to apply to those contested cases until they are all processed through the SHRC. Other proposed changes are being made at the behest of the Rules Revision Commission staff.

In addition, changes in the 01J rules reflect the new grievance process as mandated in HB 834 to be effective August 21, 2013. The new grievance process is a more streamline and shortened grievance process that emphasizes resolving grievances on the front end of the process. The process establishes strict timelines for agencies, departments and OAH to render decisions at each level of the grievance process. Prior to the law change, some cases were taking as long as two to three years to reach resolution. The new process requires agencies to reach a Final Agency Decision within 90-days from the beginning of the formal grievance process and G.S. 126-34.02(a) requires OAH to review cases within 180 days from the commencement of the case at OAH.

The new agency grievance process standardizes mediation across all state agencies and universities as a required step in the grievance process including the new requirement for grievances arising from discrimination and harassment claims. Prior to the rule change, mediation was an agency/ university choice. The required inclusion of mediation is expected to reduce expenses associated with contested cases at the Office of Administrative Hearings. If the agency cannot resolve the grievance through mediation, the next step of the process requires a formal internal hearing either with a hearing officer or hearing panel. The hearing officer or hearing panel makes recommendation to the agency head for the Final Agency Decision which must be forwarded to OSHR for review and approval. The inclusion of mediation, formal hearings and OSHR approval of Final Agency Decision are all put in place to reduce the number of cases that move forward to OAH for litigation.

ESTIMATED IMPACT:

HB 834 clarified the issues that could be brought up in the grievance process, required all issues to go through the internal grievance procedure, mandated mediation (thus allowing for more opportunities for early intervention and resolution), and then limited the time frames for the internal and external process. The proposed rules reflect all of these changes and the agency expects that they would reduce the overall costs associated with the employee appeals process. While the proposed rule change would increase the amount of resources spent at the agency level, it would reduce the overall time spend on the grievance process by state employees and by OSHR and OAH personnel. Additionally, the State would benefit from reduced back pay and attorney's fees awarded to employees. While this would be a negative benefit to the affected employees, the loss would be offset by the savings from a faster process and not needing to retain legal counsel for long periods of time. The analysis below discusses these impacts in detail.

State Government:

Agencies: OSHR expects that the changes to these rules would have a positive fiscal impact for the State and should reduce the litigation costs associated with contested cases. The inclusion of the mediation program is expected to reduce the number of grievances that proceed through the formal grievance process and are filed with OAH as a contested case by 20%. This

percentage is an estimate based on review of agencies/universities that chose to participate in the mediation process prior to the change of the grievance process requiring mediation.

Earlier resolution, would lead to savings for the agencies in back pay and attorney's fees in those cases decided against the State where such awards were made. Since 20% fewer cases would move to OAH, and employees are much less likely to retain legal counsel during the agency grievance process, OSHR expects a tantamount reduction, of 20%, in the total amount of attorney's fees paid by agencies.

While OAH would hear 20% fewer cases, it is unclear what the net impact would be to back pay awards. OSHR have instances of cases that have taken a few years to reach resolution, but no information on the average time cases spent at OAH. Also, this time saving would be partially offset by the cases spending more time in the agency grievance process than before. OHSR nevertheless expects awarded back pay to decrease since the legislative changes have shortened the grievance process at the agency level by 25% (the upper time limit for resolution decreases from 120 days to 90 days) and has capped the time amount of time OAH can hear a grievance case to 180 days. As a result, the analysis is making the conservative assumption that there would be a 20% reduction in awarded back pay as well.

OAH has awarded attorney's fees and back pay in approximately 11 cases per year at an average total annual cost of \$55,000 for attorney's fees and \$385,000 in back pay. Assuming these average levels would stay constant going forward and expecting a 20% reduction in awards, the estimated saving to the State from reduced attorney's fees and back pay is about \$88,000.

As mentioned above, the proposed rule changes would limit the grievance period to 90 days from 120, therefore, the process would be shorter by 25%. This would result in employees and supervisors involved in grievances spending less time on this process and more time performing their regular tasks. Based on historical grievance data, employees and supervisors spent on average 5% of their annual time on the grievance process including when the employee directly filed the grievance as a contested case at OAH. There are 2,080 working hours per year, so 5% equates to 104 hours per employee. Including salary and 34% for benefits, the analysis assumes that the hourly total compensation for a grievant is \$24.70 and for a supervisor \$36.50. Therefore, the average saving in terms of state employees' time spent on grievances is estimated at about \$1,600 per case. There were close to 180 grievance cases in the last fiscal year that did not go through mediation. Assuming that this level stays constant, the total annual saving of staff time from a shorter process could amount to \$281,600.

The analysis may be slightly overestimating this saving. The 180 grievance cases from the last fiscal year also include equal employment opportunity cases, which are not disciplinary and not affected by the proposed changes. Additionally, since employees would now be required to go through the agency grievance process and not take their case directly to OAH, agency staff may see in an increase in the time they spend on certain grievance cases, and this may offset partially the saving estimated above. HR Employee Relations Staff in agencies and universities expects a minimal cost from the proposal.

OAH: The OAH staff time devoted to HR administrative cases would be reduced by an estimated 20% due to fewer contested cases filed. According to OAH, their staff spent 20% of time on HR related casework, or 416 hours per staff. A 20% reduction in OAH annual work time spent is 83 hours, or about \$76,100, based on staff salaries and average employee compensation of 34%.

OSHR: The OSHR already has a robust mediation program in place to handle the required mediation process. OSHR has a staff of trained mediators available to provide the mediation services so no additional staff or funds should be required to implement the mandated mediation program. However, there would be an opportunity cost to mediation staff spending more time on the new grievance process. Since HB 834 went into effect, out of the 176 complaints filed, there were approximately 60 additional cases from September 2013 to August 2014, which resulted from EEO and Performance Rating Disputes, that under the new law had to include the mediation step. Therefore, OSHR assumes that the proposed rules would result in approximately 60 additional mediations that the office would have to handle per year. Each mediation lasts approximately 3 hours and includes 2 mediators. Therefore, mediators spend an average of 360 hours (3 hours per mediation x 2 mediators x 60 mediations per year) more in mediation per year due to the new grievance process. Most mediators are supervisors, and their average hourly compensation (salary and benefits) is \$36.50. Thus, OSHR expects that the opportunity cost for the additional hours spent on mediation by its staff would be about \$13,100 (360 additional hours x staff hourly compensation of \$36.50).

The OSHR review of all Final Agency Decisions (FAD) will ensure consistency in disciplinary action throughout state government and it is anticipated that it will also reduce the number of contested cases that result in overturned actions by OAH; therefore, it will result in cost savings as stated above. The requirement for all Final Agency Decisions to be reviewed and approved by OSHR does increase the workload of the OSHR general counsel and Employee Relations staff by 20 percent, based on staff's best professional judgment. OSHR total yearly cost (employee salary and benefits) spent on FAD consultation and review is about \$73,440, so the value of the additional 20% of time the agency would spend on FAD is about \$14,700. Due to internal reorganization and shifting of services and resources, it is not expected that additional staff will be required to review Final Agency Decisions at OSHR.

The changes in the grievance process will require agencies to review their internal grievance process and make necessary adjustments to comply with the law and the rules. It will also require communication to management and employees on the new internal grievance process. This will result in an initial impact on HR staff time and resources upon implementation.

Considering the anticipated reduction in cases going to OAH, increase in cases OSHR needs to mediate and review for FAD, the anticipated reduced number of cases being overturned and requiring back pay and attorney fees, and the reduction in state employee time spent on the grievance process, OSHR is estimating net cost savings to the State of close to \$417,900 (\$88,000 + \$281,600 + \$76,000 - 13,100 - 14,700)

Affected Employees:

The proposed policy would also affect those employees who would grieve. As mentioned above, the overall grievance process would be shorter. Since there is no information on the

faction of employees who would grieve after being fired, the resulting value of the time saved by the employees, more than \$100,000, was included in the \$281,600 opportunity cost to the State from a faster process. It is unknown how much of their personal time grievants spend on the matter or how the proposal would affect that amount.

OSHR does expect that employees would receive about \$88,000 less in back pay and attorney's fees per year; however, this loss would be offset by less time spend in the process and by not needing to retain legal counsel for a long time.

OSHR does not believe that a more agency focused grievance process would results in different outcomes versus the process outlined in the current rules.

APPENDIX

PROPOSED RULE CHANGES

25 NCAC 01B .0350 is proposed to be amended as follows:

CHAPTER 01 – OFFICE OF STATE PERSONNEL HUMAN RESOURCES

SUBCHAPTER 1B - STATE PERSONNEL HUMAN RESOURCES COMMISSION

25 NCAC 01B .0350 TIME FRAME FOR RAISING ALLEGATION OF DISCRIMINATION

For cases arising before [January 1, 2012], August 21, 2013, allegations Allegations of discrimination based on

NCGS 126-16, 36, 36.1 must be raised within 30 days, either in a direct appeal to the State Personnel [Human

Resources] Commission Office of Administrative Hearings or within the departmental grievance procedure, of the

date of the action that is alleged to be discriminatory. Failure to raise such an allegation within 30 days shall be

cause to have such allegation dismissed.

History Note:

Authority G.S. <u>126-4</u>; 126-38; <u>G.S. 126-34.01</u>; 126-34.02.

Eff. February 1, 1985. February 1, 1985;

Temporary Amendment Eff. May 23, 2014

25 NCAC 01B .0413 is proposed to be amended as follows:

25 NCAC 01B .0413 EXERCISE OF COMMISSION DISCRETION

<u>For cases arising before January 1, 2012, the The State Personnel Human Resources Commission will shall weigh</u> all relevant factors and circumstances in employee contested cases, including factors of mitigation and justification,

in making a decision in a contested case of whether disciplinary action was imposed for just cause.

History Note:

Authority G.S. 126-4(9); 126-37;

Eff. August 1, 1980;

Amended Eff. September 1, 2014; May 29, 1989;

Temporary Amendment Eff. May 23, 2014

25 NCAC **01C.0311 IS** proposed to be amended as follows:

25 NCAC 1C .0311 REMEDIES OF EMPLOYEES OBJECTING EMPLOYEE OBJECTION TO

MATERIAL IN FILE

[(a) An employee, former employee, or applicant for employment who objects to material in the employee's file

may place in his or her file a written statement relating to the material he or she considers to be inaccurate or

misleading.

(b) An employee, former employee, or applicant for employment who objects to material in his or her personnel file

must seek the removal on the basis that the information is inaccurate or misleading by filing a grievance through the

agency grievance procedure.

(c) If the agency determines that the material in the employee's personnel file is inaccurate or misleading, the

agency shall remove or amend the inaccurate material so that the material objected to is accurate.

(d) The employee does not have the right to appeal the contents of a performance appraisal or written warning.

(e) No appeal involving objection to material in the file shall be filed with the Office of Administrative Hearings.]

An employee, former employee, or applicant objecting to material in his or her personnel file may follow the

internal agency grievance procedure in order to bring the existence of inaccurate or misleading information to the

attention of the agency, so long as that information is not a written disciplinary action or a performance appraisal.

If, during the agency grievance procedure, the agency agrees that the information should be removed or amended

from the file, the agency shall remove or amend the information. However, the employee may not appeal the

agency's decision to the Office of Administrative Hearings.

History Note:

Authority G.S. 126 34.01; 126 34.02; G.S. 126-25;

Temporary Amendment Eff. May 23, 2014

25 NCAC 01H.1103 is proposed to be amended as follows:

25 NCAC 01H .1103 ALLEGATION OF DENIAL OF VETERANS' PREFERENCE

Any claim or allegation that veterans' preference has not been accorded to an eligible veteran shall be filed with the State Personnel Commission through the contested case procedures of the Office of Administrative Hearings. Such claims shall be filed in a manner consistent with the requirements of G.S. 150B 23 and G.S. 126 38. Such claims shall be heard as contested cases pursuant to G.S. 150B, Article 3. The State Personnel Commission may, upon a finding that veterans' preference was denied in violation of these Rules, order the employment, subsequent employment, promotion, reassignment or horizontal transfer of any affected person, as well as any other remedy necessary to correct the violation. first follow the agency grievance procedure.

History Note: Authority G.S. 126-4(10); 126-4(11); 128-15; 126-34.1(b)(4); 126-37; 126-38; 150B-2(2);

150B, Article 3;[S. L. 2013 382;] S.L. 2013-382, sec. 6.1;

Eff. September 1, 1987;

Recodified from 25 NCAC 01H .0613 Eff. October 5, 2004;

Amended Eff. June 1, 2008; February 1, 2007; February 17, 2014-;

Amendment Eff. September 1, 2014.

Temporary Amendment Eff. February 28, 2014

25 NCAC 01J .0603 APPEALS

- (a) A career employee who has been demoted, suspended or dismissed shall have 15 calendar days from the date of his <u>or her</u> receipt of written notice of such action to file an appeal with his department/university grievance procedure. If an employee does not appeal his <u>or her</u> dismissal through the agency grievance procedure within 15 days, the initial letter of dismissal setting forth the specific acts or omissions that are the basis of the dismissal shall become the agency's final agency decision. then the employee shall have no right to file a contested case with the Office of Administrative Hearings under G.S. 126-34.02.
- (b) If an employee appeals his <u>or her</u> dismissal through the agency grievance procedure, then the initial dismissal letter shall not constitute the final agency decision, but the final agency decision shall be the decision made at the conclusion of the employee's appeal through the agency grievance procedure. Grievances which do not allege discrimination, a violation of G.S. 126 7.1(a) or (c), a violation of G.S. 126 82, or that do not allege a denial of employment or promotion in violation of G.S. 126 14.2 must follow the department or university grievance procedure. An appeal to the State Personnel Commission of a final departmental or university decision must be filed with the Office of Administrative Hearings in accordance with G.S. 150B 23 within 30 calendar days of receipt of the final agency decision. Grievances which allege unlawful workplace harassment must be submitted in writing to the agency or department, within 30 calendar days of the alleged harassing action, and the agency or department must be given 60 calendar days in which to take remedial action, if any, unless the department or agency has waived the 60 day period, and the employee has acknowledged such waiver. The acknowledgement and waiver shall be in writing. An appeal to the State Personnel Commission of unlawful workplace harassment must be filed with the Office of Administrative Hearings in accordance with G.S. 150B 23 and within 30 calendar days of notification of the remedial action, if any, taken by the agency.
- (b)(c) Grievances which that allege discrimination not including unlawful workplace harassment may, at the election of the employee, proceed through the department or university procedure or proceed directly to the State Personnel Commission (SPC) for a hearing by the Office of Administrative Hearings (OAH) and a decision by the SPC. A direct appeal to the SPC (such appeal involving a contested case hearing by the OAH and a decision by that agency to the SPC) alleging discrimination not including unlawful workplace harassment must be filed in accordance with G.S. 150B 23 and must be filed within 30 calendar days of receipt of notice of the alleged discriminatory act discrimination, harassment, or retaliation, retaliation must also follow the agency grievance process. [Employee] Employees with grievances alleging discrimination, harassment, or retaliation [which] who do not follow the agency grievance process shall have no right to file a contested case with the Office of Administrative Hearings.
- (c) Grievances which allege a violation of G.S. 126 14.2 must be filed with the Civil Rights Division of the OAH within 30 calendar days after the employee or applicant receives written notice that the position in question has been filled. The employee or applicant must file a petition for a contested case hearing pursuant to G.S. 126 34.1 and

Article 3 of Chapter 150B within 15 days of the initial determination by the OAH Civil Rights Division that there has been a violation of G.S. 126-14.2.

- (d) Grievances filed on an untimely basis (see G.S. 126 14.4, 126 35, 126 36 and 126 38) must be dismissed. Allegations of discrimination raised more than 30 calendar days after receipt of notice of the occurrence of the alleged discriminatory act must be dismissed. Grievances alleging unlawful workplace harassment raised more than 30 calendar days after notification of the remedial action, if any, taken by the agency must be dismissed.
- (d) The following grievances must also [be] follow the agency grievance procedure before being filed in the Office of Administrative Hearings: denial of veteran's preference provided for in Chapter 128 of the General Statutes; denial of hiring or promotion because of an unlawful failure to post a position; denial of hiring or promotion due to failure to receive career State employee priority consideration; denial of hiring or promotion due to failure to receive reduction in force priority [consideration], consideration; and a whistleblower grievance as provided in Article 14 of Chapter 126.

History Note: Authority G.S. 126-1A; 126-35; 150B, Article 3; 150B-23; G.S. 126-34.01, -34.02;

Eff. February 1, 1976;

Amended Eff. March 1, 1994; April 1, 1989; December 1, 1984; October 1, 1984;

Temporary Amendment Eff. February 18, 1999;

Amended Eff. February 1, 2011; July 18, 2002-;

Temporary Amendment Eff. May 23, 2014

25 NCAC 01J.0610 is proposed to be amended as follows:

25 NCAC 01J .0610 WRITTEN WARNING

(a) The supervisor shall monitor and promote the satisfactory performance of work assignments and assure that

employees do not engage in unacceptable personal conduct. All types of performance-related job inadequacies may

constitute unsatisfactory job performance under this Section. Unacceptable personal conduct may be work-related

and or non-work-related conduct and may be intentional or unintentional. When the supervisor determines that

disciplinary action is appropriate for unsatisfactory job performance, a written warning is the first type of

disciplinary action that an employee must receive. The supervisor may elect to issue a written warning for grossly

inefficient job performance or unacceptable personal conduct. [conduct, without waiving the agency's right to the

treat future occurrences of the same conduct as subject to immediate dismissal.] The written warning must:

(1) <u>Inform inform</u> the employee that this is a written warning, and not some other non-disciplinary

process such as counseling;

(2) <u>Inform inform the employee of the specific issues that are the basis for the warning;</u>

(3) Tell tell the employee what specific improvements if applicable improvements, if applicable, must

be made to address these specific issues;

(4) Tell tell the employee the time frame allowed for making the required improvements/corrections.

Absent a specified time frame, 60 days is the time frame allowed for <u>correcting</u> unsatisfactory job performance and immediate correction is required for grossly inefficient job performance or

unacceptable personal conduct; and

(5) Tell tell the employee the consequences of failing to make the required improvements/corrections;

(b) A written warning must be issued in accordance with the procedural requirements of this Section, and include

any applicable appeal rights.

History Note: Authority G.S. 126-4; G.S. 126-34.02;

Eff. February 1, 1976;

Amended Eff. October 1, 1995; November 1, 1990; January 1, 1989; September 1, 1988.

September 1, 1988;

Temporary Amendment Eff. May 23, 2014

25 NCAC 01J.0615 is proposed to be amended as follows:

25 NCAC 01J .0615 INVESTIGATORY LEAVE

- (a) PLACEMENT ON INVESTIGATION—Investigation status Investigatory leave with pay is used to temporarily remove an employee from work status. Placement on investigation-investigatory leave with pay does not constitute a disciplinary action as defined in this-Section Section, G.S. 126-34.02, or in G.S. 126-35. Management must notify an employee in writing of the reasons for investigatory—placement on investigatory leave not later than the second scheduled work day after the beginning of the placement. An investigatory placement Investigatory leave with pay may last no longer than 30 calendar days without written approval of extension by the agency head and the State Personnel Human Resources Director. The State Personnel Human Resources Director shall approve an extension of the period of investigatory status leave with pay, for no more than an additional 30 calendar days, for one or more of the following reasons:
 - (1) The matter is being investigated by law enforcement personnel, and the investigation is not complete; complete, and the agency is unable to complete its own independent investigation without facts contained in the law enforcement investigation, and the agency is unable to conduct its own investigation; or
 - (2) A management individual who is necessary for resolution of the matter is temporarily unavailable; or
 - (3) A person or persons whose information is necessary for resolution of the matter is/are temporarily unavailable.
- (b) When an extension beyond the 30-day period is required, the agency must advise the employee in writing of the extension, the length of the extension, and the reasons for the extension. If no action has been taken by an agency by the end of the 30-day period and no further extension has been granted, the agency shall either take appropriate disciplinary action on the basis of the findings upon made during the investigation or return the employee to active work status. It is not permissible to use placement on investigation status for the purpose of delaying an administrative decision on an employee's work status pending the resolution of a civil or criminal court matter involving the employee.
- (c) It is permissible to place an employee in investigation status with pay on investigatory leave only under the following circumstances:
 - (1) To investigate allegations of performance or conduct deficiencies that would constitute just cause for disciplinary action;
 - (2) To provide time within which to schedule and conduct a pre-disciplinary conference; or
 - (3) To avoid disruption of the work place and to protect the safety of persons or property, property; or
 - (4) To facilitate a management directed referral or fitness for duty/risk evaluation to ensure the employee's safety and the safety of others and/or to obtain medical information regarding the employee's fitness to perform his or her essential job functions; or
 - (5) For other good cause shown, only as approved by the State Human Resources Director.

- (d) CREDENTIALS—Some duties assigned to positions in the state service may be performed only by persons who are licensed, registered or certified as required by the relevant law, rule, or provision. All such requirements and restrictions shall be specified in the statement of essential qualifications or recruitment standards for classifications established by the State Personnel Commission. Employees in such classifications shall obtain and maintain current, valid credentials as required by law. Failure to obtain or maintain the legally required credentials constitutes a basis for dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who is dismissed for failure to obtain or maintain credentials shall be dismissed under the procedural requirements applicable to dismissals for unacceptable personal conduct or grossly inefficient job performance. Falsification of employment credentials or other documentation in connection with securing employment constitutes just cause for disciplinary action. When credential or work history falsification is discovered after employment with a state agency, disciplinary action shall be administered as follows:
 - (1) If an employee was determined to be qualified and was selected for a position based upon falsified work experience, education, registration, licensure or certification information that was a requirement for the position, the employee must be dismissed in accordance with 25 NCAC 01J .0608.
 - (2) In all other cases of post hiring discovery of false or misleading information, disciplinary action shall be taken, but the severity of the disciplinary action shall be at the discretion of the agency head.
 - (3) When credential or work history falsification is discovered before employment with a state agency, the applicant shall be disqualified from consideration for the position in question.
- (e) Every disciplinary action shall include notification to the employee in writing of any applicable appeal rights.
- (f) Warnings and placement on investigation with pay are not grievable unless an agency specifically provides for such a grievance in its agency grievance procedure. Absent an allegation of a violation of G.S. 126-25, warnings shall not appealable to the State Personnel Commission.
- (g) An agency shall furnish to an employee as an attachment to the written documentation of any grievable disciplinary action, a copy of the agency grievance procedure.
- (h) Each state agency shall adopt and submit to the State Personnel Commission an internal grievance procedure that includes as an attachment an agency employee relations policy which:
 - (1) Sets out the manner and mechanism with which employees are notified of changes in agency policy and State Personnel Commission rules;
 - (2) Sets out the policy on the use of disciplinary suspension and the procedure for the issuance of warnings;
 - (3) Sets out the policy on the retention of warnings and other disciplinary actions in employee personnel files; and
 - (4) Sets out the policy on how an employee may access the employee's personnel file.
- (i) Each state agency shall maintain records and provide the OSP information and statistics on the discipline and dismissal process commencing in January 1996 and every year thereafter.

(j) Each state agency shall insure that designated personnel are trained in the administration of this Section.

History Note: Authority G.S. 126-4; 126-35; <u>S.L. 2013-382</u>;

Eff. October 1, 1995;

Amended Eff. January 1, 2011; April 1,2005-:

Amendment Eff. September 1, 2014.

25 NCAC 01J.0616 is proposed to be adopted as follows:

25 NCAC 01J .0616 CREDENTIALS

- (a) Some duties assigned to positions in the state service may be performed only by persons who are licensed, registered or certified as required by the relevant law, rule, or provision. All such requirements and restrictions shall be specified in the statement of essential qualifications or recruitment standards for classifications approved by the State Human Resources Commission. Employees in such classifications shall obtain and maintain current, valid credentials as required by law.
- (b) Failure to obtain or maintain the legally required credentials constitutes a basis for dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who is dismissed for failure to obtain or maintain credentials shall be dismissed under the procedural requirements applicable to dismissals for unacceptable personal conduct or grossly inefficient job performance.
- (c) Falsification of employment credentials or other documentation in connection with securing employment constitutes just cause for disciplinary action. When credential or work history falsification is discovered after employment with a state agency, disciplinary action shall be administered as follows:
 - (1) If an employee was determined to be qualified and was selected for a position based upon falsified work experience, education, registration, licensure or certification information that was a requirement for the position, the employee must be dismissed in accordance with 25 NCAC 01J .0608.
 - (2) In all other cases of post-hiring discovery of false or misleading information, disciplinary action shall be taken, but the severity of the disciplinary action shall be at the discretion of the agency head.
 - When credential or work history falsification is discovered before employment with a state agency, the applicant shall be disqualified from consideration for the position in question.

History Note: Authority G.S. 126-4; 126-35; S.L. 2013-382;

25 NCAC 01J.0617 is proposed to be adopted as follows:

25 NCAC 01J .0617 DISCRIMINATION AND RETALIATION

Neither race, religion, color, national origin, sex, age, political affiliation, disability or genetic information shall be considered in making any decisions about any term or condition of employment for any employees or applicants.

Nor shall the fact that an employee or applicant has complained about discrimination or participated in a hearing, proceeding, or investigation of discrimination be considered when making any decisions about any term or condition of employment.

History Note: Authority S.L. 2013-382, sec, 7.1;

Temporary Adoption Eff. February 28, 2014

25 NCAC 01J.0618 is being proposed for adoption as follows:

25 NCAC 01J .0618 APPEAL OF DENIAL OF VETERAN'S PREFERENCE

An appeal by an applicant, employee, or former employee that he or she was denied a veteran's preference in initial employment, subsequent hiring, promotion, reassignment, horizontal transfer, or other employment event in violation of the law shall first be made through the agency grievance procedure.

History Note: Authority S.L. 2013-382, sec. 6.1;

Temporary Adoption Eff. February 28, 2014

25 NCAC 01J .1101 UNLAWFUL WORKPLACE HARASSMENT AND RETALIATION

(a) Purpose. The purpose of this Rule is to establish that the State of North Carolina prohibits in any form unlawful workplace harassment harassment, including sexual harassment or retaliation based on opposition to unlawful workplace harassment of state employees or applicants and applicants. to require that every Every agency and university with employees subject to the State Human Resources Act shall establish policies and programs develop strategies to ensure that work sites are free of unlawful workplace harassment, sexual harassment, discrimination and retaliation.

(b) As used in this Rule:

- (1) Unlawful workplace harassment "unlawful workplace harassment" is defined as means unsolicited and unwelcome speech or conduct based upon race, sex, creed, religion, national origin, age, color, or disabling conditions as defined by G.S. 168A.3 disability, or genetic information that creates a hostile work environment or under circumstances involving quid pro quo.
- (2) Hostile Work Environment is one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Hostile work environment is determined by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.
- (3) Quid Pro Quo harassment consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct when:
 - (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
 - (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- (3) (2) "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct when:
 - (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
 - (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 - (C) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."
- (4) (3) Retaliation "retaliation" is defined as means adverse action taken against an individual for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit related to discriminatory employment practices based on race, religion, color, national

- <u>origin</u>, sex, age, <u>disability</u> or <u>genetic information</u> or <u>because of opposition to <u>employment</u> practices in violation of the unlawful workplace harassment. harassment policy.</u>
- (c) Policy. No state employee shall engage in conduct that falls under the definition of unlawful workplace harassment, <u>sexual harassment</u> or <u>retaliation as defined in Paragraph (b) of this Rule, retaliation, and no <u>personnel employment</u> decisions shall be made on the basis of race, sex, <u>creed, religion, national origin, age, color, or disabling condition as defined by G.S. 168A.3. <u>disability, or genetic information.</u></u></u>
- (d) All employees are guaranteed the right to work in an environment free from unlawful workplace harassment and retaliation.

(e) Coverage of the Rule includes:

- (1) applicants,
- (2) former employees, and
- (3) full-time and part-time employees with either a permanent, probationary, trainee, time-limited or temporary appointment.
- (e) Grievances. Any current or former state employee who feels he or she has been the victim of unlawful workplace harassment or retaliation in violation of this Rule shall file a grievance through the departmental grievance procedure. Filing such a written complaint is a prerequisite to any further appeal to the Office of Administrative Hearings regarding unlawful workplace harassment or retaliation. After the employee's written complaint is submitted to the agency or university, the department, agency or university shall have 60 days within which to consider the complaint and take any remedial action, unless the department, agency or university has waived the 60 day period, and the employee has acknowledged such waiver. The waiver and acknowledgement shall be in writing. Any current or former state employee who feels that he or she has been subjected to unlawful workplace harassment or retaliation may appeal directly to the Office of Administrative Hearings (such appeal consisting of a contested case hearing under G.S. 150B and a decision by the Office of Administrative Hearings) only after submitting a written complaint through the agency grievance and waiting 60 days or receiving notification of remedial action, if any, by the department, agency or university whichever shall occur first.
- (f) Agency or University Plans Prevention Strategies. Each agency head or university chancellor shall develop strategies to prevent unlawful workplace harassment. These strategies at the minimum should include:
 - (1) a commitment by the agency to the prohibition of unlawful workplace harassment, sexual harassment or retaliation;
 - (2) training and other methods to prevent harassing actions; and
 - (3) a process for disseminating information prohibiting unlawful workplace harassment and retaliation to all agency employees.

Workplace harassment prevention strategies shall be included as part of the agency Equal Employment Opportunity (EEO) plan.

include as a supplement to the Affirmative Action Plan or Equal Employment Opportunity Plan a plan setting forth the steps to be taken to prevent and correct unlawful workplace harassment and retaliation. Each department, agency or university shall submit such a plan to the Office of State Human Resources for review, technical

assistance, and approval by the Director of the Office of State Human Resources. Each plan on unlawful workplace harassment and retaliation shall include:

- (1) publication and dissemination of a policy statement establishing that unlawful workplace harassment and retaliation of employees and applicants is prohibited;
- (2) establishment of internal procedure to handle complaints of unlawful workplace harassment and retaliation. This procedure shall provide investigation and resolution of complaints within the department or university and shall offer the employee recourse other than through the immediate supervisor;
- (3) utilization of training and other methods to prevent unlawful workplace harassment and retaliation:
- (4) statement that the department will, in allegations of unlawful workplace harassment or retaliation, review the entire record and the totality of the circumstances, to determine whether the alleged conduct constitutes unlawful workplace harassment or retaliation;
- (5) development of disciplinary actions for conduct determined to constitute unlawful workplace harassment or retaliation, to be implemented on a case by case basis on the facts of each complaint;
- (6) prohibition of internal interference, coercion, restraint or reprisal against any person complaining of alleged unlawful workplace harassment or retaliation; and
- (7) notification to all employees that a complaint or allegation of unlawful workplace harassment or retaliation must be filed within the department, agency or university and that the department, agency or university has 60 days (or fewer, if waived by the department, agency or university and acknowledged by employee) to take action, if any, in response to the complaint prior to the filing of a complaint of unlawful workplace harassment or retaliation with the Office of Administrative Hearings.

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History Note: Authority G.S. 126-4; 126-16; 126-17; 126-34.01; 126-34.02; 126-36; 126-36.1;
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Eff. December 1, 1980;

Amended Eff. November 1, 1988; April 1, 1983;

Temporary Amendment Eff. February 18, 1999;

Amended Eff. July 18, 2002;

Recodified from 25 NCAC 01C .0214 Eff December 29, 2003;

Amended Eff. June 1, 2012. June 1, 2012;

Temporary Amendment Eff. May 23, 2014.

25 NCAC 01J.1201 is being proposed to be repealed as follows:

SECTION .1200 - EMPLOYEE GRIEVANCES

25 NCAC 01J .1201 GENERAL PROVISIONS

(a) This Section contains general provisions for two grievance procedure options: the Employee Appeals and

Grievance Process, 25 NCAC 01J .1301 and the Employee Mediation and Grievance Process, 25 NCAC 01J .1400.

(b) Agencies may choose to adopt the Employee Appeals and Grievance Process, which does not offer mediation,

or choose to adopt the Employee Mediation and Grievance Process. The provisions of 25 NCAC 01J .1201 through

.1208 apply to both processes.

(c) An employee who has access to the agency grievance procedure shall initiate the grievance proceeding no later

than 15 calendar days after the last act that constitutes the basis of the grievance.

(d) For the purpose of this Section, except for appeals brought under G.S. 126-25, the term "career state employee"

as used in this Section shall have the meaning assigned to it by the State Personnel Act. The employee must have

attained career status at the time the act, grievance or employment practice that is the basis of the grievance occurs.

(e) Neither the agency nor the employee shall be represented by any outside parties during any internal grievance or

mediation proceedings.

History Note:

Authority G.S. 126-1.1; 126-4(17); 126-25; 126-34; 126-35; 126-39;

Eff. March 1, 2005.

25 NCAC 01J.1202 is being proposed to be repealed as follows:

25 NCAC 01J .1202 AGENCY RESPONSIBILITIES

(a) The agency grievance procedure shall be implemented and continuously evaluated by the agency. Each agency

shall, on or before January 1 of each even numbered year, submit to the Office of State Personnel either:

(1) the current agency grievance procedure for approval; or

(2) a statement that its grievance procedure has not changed since January 1 of the last prior

even numbered year, including a certification that the current agency procedure is in compliance

with current state law and rules and the effective date of the last change to the agency procedure.

(b) The Office of State Personnel shall review the reports of each agency as required by Rule .1203 of this Section

and the grievance procedures of each agency for compliance with applicable law, rules and good employee relations

practices. After such review and following resolution of any areas of disagreement, the Office of State Personnel

shall forward the grievance procedure to the State Personnel Commission for reaffirmation of an unchanged agency

grievance procedure previously approved or for approval of a new or modified agency grievance procedure. No

agency grievance procedure is applicable to any employee until it has been approved by the State Personnel

Commission.

History Note:

Authority G.S. 126-4(9);

Eff. March 1, 2005.

25 NCAC 01J.1203 is being proposed to be repealed as follows:

25 NCAC 01J .1203 AGENCY GRIEVANCE REPORTS

(a) Every agency shall, semi annually and as otherwise requested by the Office of State Personnel, compile

information on employee grievances. These reports shall be due to the Office of State Personnel on the first

business day of each of the following months: January and July.

(b) The Office of State Personnel shall make reports to the full State Personnel Commission at its February and

August meetings based upon the information supplied in these semi-annual agency reports.

History Note:

Authority G.S. 126-4(9);

Eff. March 1, 2005.

25 NCAC 01J.1204 is being proposed to be repealed as follows:

25 NCAC 01J .1204 DISCRIMINATION AND RETALIATION / SPECIAL PROVISIONS

Employees alleging illegal discrimination or retaliation may choose to follow the agency grievance procedure,

including mediation, or choose to appeal directly to the State Personnel Commission. The 30 day timeframe to file

a grievance alleging discrimination must be adhered to whether the employees choose to follow the agency

grievance procedure, including mediation, or whether they choose to appeal directly to the State Personnel

Commission by filing a petition for a contested case hearing with the Office of Administrative Hearings. The 30

day timeframe is not applicable to discrimination complaints filed with the Equal Employment Opportunity

Commission.

History Note:

Authority G.S. 126-4(9); 126-16; 126-17; 126-34.1(a);126-36(a);

Eff. March 1, 2005.

25 NCAC 01J.1205 is being proposed to be repealed as follows:

25 NCAC 01J .1205 UNLAWFUL WORKPLACE HARASSMENT

Employees alleging unlawful workplace harassment or retaliation concerning unlawful workplace harassment shall

follow the procedure established in the agency Unlawful Workplace Harassment Policy, as required by 25 NCAC

01J .1101(f), in order to bring a subsequent appeal to the State Personnel Commission. Employees may by pass any

step in the agency's grievance procedure involving discussions with or review by the alleged harasser. The agency

shall complete processing of an allegation of unlawful workplace harassment or retaliation within 60 days. Nothing

in this Rule extends the amount of time an agency has in which to complete a review of such an allegation, even if

the employee chooses mediation as an option in the agency's Unlawful Workplace Harassment Policy.

History Note:

Authority G.S. 126-4(9); 126-4(11);) 126-34.1(a);126-36(b)(1),(2)

Eff March 1, 2005.

25 NCAC 01J.1206 is being proposed to be repealed as follows:

25 NCAC 01J .1206 TIME LIMITS

(a) A final agency decision (FAD) must be issued within a reasonable period of time from the date the grievance is

filed or the employee may, if eligible, appeal to the State Personnel Commission without receiving a FAD.

(b) For cases involving discharge or demotion of a career State employee for disciplinary reasons, the reasonable

period of time is 90 days from the filing of the grievance to the issuance of the FAD. For all issues except demotion

or dismissal, a reasonable period of time for an employee to receive a FAD is 120 days from the time the grievance

was filed. The employee and the agency may mutually agree to extend the time in either case.

(c) If the employee cannot obtain the FAD within a reasonable period of time, the employee's right of appeal shall

be governed by G.S. 126 34.1 and G.S.150B 23(f).

History Note:

Authority G.S. 126-4(9); 126-34.1;

Eff. March 1, 2005.

25 NCAC 01J.1207 is being proposed to be repealed as follows:

25 NCAC 01J .1207 FINAL AGENCY ACTION

In every employee grievance in which the grievant has the right of appeal to the State Personnel Commission (SPC),

the final decision of the agency head must inform the grievant in writing that any appeal from the final agency

decision must be made to the SPC within 30 days after receipt of notice of the decision or action which triggers the

right of appeal. Further, the agency shall inform the grievant in writing that an appeal to the SPC shall be made by

filing a petition for contested case hearing with the Office of Administrative Hearings, 424 North Blount Street,

6714 Mail Service Center, Raleigh, North Carolina 27699 6714.

History Note:

Authority G.S. 126-4(9); 126-7.2; 126-35; 126-37; 126-38; 150B-23(a);

Eff. March 1, 2005.

25 NCAC 01J.1208 is being proposed to be repealed as follows:

25 NCAC 01J .1208 LEAVE IN CONNECTION WITH GRIEVANCES

(a) An employee shall be allowed time off from regular duties as may be necessary and reasonable up to a

maximum of eight hours for the preparation of an internal grievance under the procedures adopted within the agency

without loss of pay, vacation leave or other time credits.

(b) Necessary and reasonable time for participation in contested case hearings and other administrative proceedings

outside the agency in connection with employment, as a party, shall be granted upon request to the employee's

supervisor or personnel officer without loss of pay, vacation leave or other time credits. Management may require

prior official notice of the scheduling of and documentation by the presiding official or designee of the time the

employee spent in attendance at these administrative proceedings.

History Note:

Authority G.S. 126-4(9);

Eff. March 1, 2005.

25 NCAC 01J .1301 MINIMUM PROCEDURAL REQUIREMENTS

The following provisions are the requirements of an agency employee appeals and grievance process for approval by the State Personnel Commission.

- (1) An employee with a grievance that does not allege unlawful discrimination as defined by G.S. 126 16 or G.S. 126 36, that does not allege a violation of G.S. 126 7.1(a) or (c), that does not allege a violation of G.S. 126 82, or that does not allege a denial of employment or promotion in violation of G.S. 126 14.2 shall be required to first discuss the problem with the immediate supervisor. Where the grievance does not fall within the administrative or decision making authority of the immediate supervisor, the immediate supervisor, shall within 48 hours of receipt of the grievance, refer the grievance to the lowest level supervisor with administrative or decision making authority over the subject matter of the grievance and notify the employee of the fact of and the basis for the referral. The agency grievance procedure shall outline those issues in addition to contested case issues under G.S. 126 34.1, if any, that are grievable under each agency's internal grievance procedure and whether and to what extent persons who have not attained career status under G.S. 126 1.1 may utilize the agency grievance procedure.
- (2) The employee shall have the right to have the decision of the immediate supervisor reviewed. The step or steps after the immediate supervisor's step shall include a step at which the employee has the right to orally present the grievance and where the reviewer is outside the employee's chain of command.
- (3) Any decision rendered after the step of the supervisor's decision shall be issued in writing and the final agency decision shall be issued within a reasonable period of time as defined in 25 NCAC 01J.1206(b).
- (4) At the step involving the reviewer (person or body) outside the employee's chain of command, the employee shall have the right to challenge whether the reviewer can render an unbiased decision.

 The agency grievance procedure shall establish a process for challenging the reviewer's impartiality and the process for the selection of a replacement when necessary.
- (5) For matters that are contested case issues under G.S. 126 34.1, if the employee is not satisfied by the final decision of the agency head, the employee shall have the right to appeal to the State Personnel Commission within 30 days of receipt of the final agency decision. If the employee is unable within a reasonable period of time to obtain a final agency decision, the employee's right of appeal is governed by G.S. 150B 23(f).
- (6) The agency shall state the methods of notifying current employees and newly appointed employees of any change to the agency grievance procedure no later than 30 days prior to the effective date of the change.

- (7) The agency shall establish the time limit for the agency and employee to respond at each step in the grievance procedure. No time limit for an agency to respond or to act shall be more than twice the time limit for the employee.
- (8) The grievance procedure shall include the effective date of the procedure and of any changes to the procedure.
- (9) The grievance procedure shall comply with the requirements of 25 NCAC 01J .0615.

Temporary Repeal Eff. May 23, 2014

History Note:

Authority: G.S. 126-4(9); 126-4(10); 126-4(17); 126-7.2; 126-16; 126-34; 126-34.1; 126-34.2; 126-35; 126-36; 126-37; 126-38; <u>126-34.01;</u> 126-34.02; 150B-23.

25 NCAC 01J .1302 GENERAL AGENCY GRIEVANCE PROCEDURE REQUIREMENTS

- (a) All agencies and universities shall adopt the Employee Grievance Policy, which shall be approved by the State Human Resources Commission, based on the standards in Paragraph (d) of this section.
- (b) Grievances filed on an untimely basis must be dismissed.
- (c) A grievant who has an unexcused failure to attend the Step 1 Mediation or Step 2 Hearing as scheduled forfeits the right to proceed with the grievance process.
- (d) An agency or university grievance process shall include the following:
 - (1) A list of who may file a grievance;
 - (2) A list of grounds for filing a grievance under the internal grievance process:
 - (3) A list of grounds for which contested cases may be brought to the Office of Administrative Hearings after the conclusion of the grievance process;
 - (4) An informal process for attempting to resolve a grievable issue prior to the employee's filing a formal-grievance;
 - (5) The timeframes in which grievable issues must be raised in both the informal and formal grievance process;
 - (6) The timeframes in which the agency or university must complete the informal process and each step of the formal grievance process;
 - (7) Mediation shall serve as Step 1 of the formal grievance process. A description of the mediation process and timeframe to be followed in Step 1 shall be provided to include that a mediation agreement is legally binding and that if impasse occurs, the agency shall inform the grievant of the Step 2 grievance process and timeframe for filing;
 - (8) A Hearing shall serve as Step 2 of the formal grievance process. A-description of the hearing process and timeframe to be followed in Step 2 shall be provided, including that a grievant has the opportunity to present the grievance orally to a reviewer(s) outside the grievant's chain of command, e.g. hearing officer or hearing panel. The hearing officer or hearing chair shall draft a proposed recommendation with findings of fact for a final agency decision;
 - (9) The process and timeframe for the proposed recommendation to be submit ed to the Office of State Human Resources for review and approval;
 - (10) The process and timeframe for issuance of a Final Agency Decision shall not exceed 90 calendar days of the initial filing of the grievance in the formal grievance process;
 - (11) Information about any applicable appeal rights to the Office of Administrative Hearings shall be included in the Final Agency Decision;
 - (12) The responsibilities of all parties involved in the grievance process to include: grievant, respondent, hearing officer, hearing panel and chair, agency and university Human Resource

Office, Equal Employment Officer, Affirmative Action Officer, Agency Head and designee, and the Director of the Office of State Human Resources and designees; and

(13) The manner in which changes in the grievance policies will be communicated to employees.

History Note: Authority G.S. 126-34.01; 126-34.02;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1303 is proposed to be adopted as follows:

25 NCAC 01J .1303 AGENCY AND UNIVERSITY GRIEVANCE REPORTS AND DATA ENTRY

- (a) Every agency and university shall, as requested by the Office of State Human Resources, compile information on employee grievances.
- (b) The Office of State Human Resources shall make reports to the State Human Resources Commission as necessary based upon the information supplied in agency reports.
- (c) Every agency and university shall maintain all grievance data and enter grievance data by the last business day of the month in the State's HR/Payroll system or other applicable human resources information system.

History Note: Authority G.S. 126-4(6),(9);

Temporary adoption eff. May 23, 2014.

25 NCAC 01J .1304 SETTLEMENTS/CONSENT AGREEMENTS IN GRIEVANCES, CONTESTED CASES

- (a) Any mediation agreement, settlement agreement, or consent agreement in a grievance or contested case that requires the entering of data into human resources and payroll information system used by agencies with employees subject to Chapter 126, must be approved by the Office of State Human Resources for compliance with all rules contained in Subchapters 1C (Personnel Administration), 1D (Compensation), 1E (Employee Benefits), 1H (Recruitment and Selection), and 1J (Employee Relations) in Title 25 of the North Carolina Administrative Code before the agency enters the data.
- (b) Data is required to be entered into the human resources and payroll information system by an agency when it determines that an action must be taken that affects classification, salary, leave, demotion, reassignment, transfer, or for any other human resources action, except where the only personnel action taken as a result of the settlement is the substitution of a resignation for a dismissal.
- (c) Approval by the Office of State Human Resources shall be indicated by the signature of the State Human Resources Director or his or her designee in an appropriate place on the settlement or consent agreement or by other means acceptable to the Office of State Human Resources Director. This provision shall not be construed to require Office of State Human Resources approval of a settlement in which the only portion requiring approval is the awarding of attorney's fees to the employee's attorney by the Office of Administrative Hearings.
- (d) This provision shall also not be construed to require approval of any settlement the terms of which allow an employee to substitute a resignation for a dismissal and to withdraw a grievance or a contested case action.
- (e) The provisions of 25 NCAC 01A .0104 (EXCEPTIONS AND VARIANCES) must be complied with when any provision of a settlement or consent agreement in a grievance or contested case requires an exception to or variance from the rules in this Chapter contained in Subchapters 1C (Personnel Administration), 1D (Compensation), 1E (Employee Benefits), 1H (Recruitment and Selection), and 1J (Employee Relations) This compliance shall be in addition to the requirements of this Rule. Any settlement or consent agreement that contains a provision that requires an exception to or variance from existing human resources policy must be reviewed and approved by the Office of State Human Resources Director prior to the processing of any human resources action forms by the Office of State Human Resources or the university human resources and payroll system.
- (f) Requests to enter data into the State's human resources and payroll system that are required by the provisions of any settlement or consent agreement that has not been approved by the Office of State Human Resources as required by this Rule shall not be processed by the human resources and payroll information system used by agencies with employees subject to Chapter 126, and shall be returned to the agency without action.
- (g) Any mediation agreement, settlement agreement, consent agreement or order issued under Chapter 126 of the General Statutes shall comply with the rules in this Subchapter. However, no rules in this Subchapter shall constrain the authority of any agency to request an exception from these rules; nor shall any provision of these rules restrict

the discretion and authority of any decision maker applying these rules to apply the rules consistent with the decision maker's discretion and authority.

History Note: Authority G.S.-126-4; G.S. 126-34.01;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1305 is proposed to be adopted as follows:

25 NCAC 01J .1305 OFFICE OF STATE HUMAN RESOURCES REVIEW AND APPROVAL OF FINAL AGENCY DECISION (FAD)

The Director of the Office of State Human Resources or his or her designee:

- (1) Shall review every agency/university final agency decision (FAD).
- (2) Shall establish criteria and standards for the content of a FAD.
- (3) May approve as written or make recommendations for modifications or reversal to the agency so that the FAD complies with criteria established by the Office of State Human Resources.

History Note: Authority G.S. 126-34.01; G.S. 126-34.02; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1306 BACK PAY

In grievances filed on or after August 21, 2013:

- (1) Back pay may be awarded in all cases in which back pay is warranted by law.
- (2) Full or partial back pay is not dependent upon whether reinstatement is ordered.
- Gross back pay shall always be reduced by any interim earnings, except that interim earnings from employment which was approved secondary employment prior to dismissal shall not be set off against gross back pay. Any unemployment insurance benefits paid to the employee shall also be deducted from the gross back pay amount, due if unemployment insurance benefits were not taxed when received by the employee.
- (4) All applicable state and federal withholding taxes, including social security taxes, shall be paid from the reduced gross back pay due. "Reduced gross back pay" is gross back pay due minus interim earnings of and unemployment insurance benefits received.
- (5) The employee's regular retirement contribution shall be paid on the total, unreduced amount of gross back pay due.
- (6) Back pay shall include payment for all holidays that the grievant would have been paid for except for the interruption in employment status. Holiday premium pay shall not be a part of any back pay award.
- (7) Shift premium pay shall be a part of a back pay award if the grievant would have been entitled to such pay in the absence of the interruption in employment. This benefit shall not be applicable in cases involving a failure to hire or a failure to promote.
- (8) Employees shall not be entitled to any discretionary pay that may or may not have been awarded to them in the absence of the interruption in employment (for example, merit increments, holiday premium pay).
- (9) Back pay shall include any across the board compensation that would have been included in the grievant's regular salary except for the interruption in employment. This includes one time "bonuses," across the board legislative increments or across the board legislative pay increases.
- (10) If the grievant's longevity eligibility date occurred during the period of interrupted employment, back pay shall include the difference between the prorated longevity payment made at dismissal and the amount of longevity pay that would have been payable had employment not been interrupted. If the grievant is reinstated prior to his or her longevity date, no adjustment for longevity pay shall be made in the back pay award. The prorated longevity payment made at the time of dismissal shall be deducted from the full amount otherwise payable on the next longevity eligibility date.
- (11) Back pay must be applied for on the appropriate Office of State Human Resources form, available on the Office of State Human Resources website, www.oshr.nc.gov.

(12) One component of the decision to award back pay shall be evidence, if any, of the grievant's efforts to obtain available, suitable employment following separation from state government. The burden of proof that an employee mitigated his or her lost wages by seeking employment following separation shall be on the employee.

History Note: Authority G.S. 126-4(9); G.S. 126-34.01, -34.02;

Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1307 is proposed to be adopted as follows:

25 NCAC 01J .1307 FRONT PAY

In grievances filed on or after August 21, 2013:

(1) Front pay may be awarded in all cases in which front pay is warranted by law.

(2) "Front pay" is the payment to an employee above his or her regular salary, such excess amount

representing the difference between the employee's salary in his or her current position and a

higher salary determined to be appropriate due to a finding of discrimination.

(3) Front pay may also result from an order of reinstatement to a position of a particular level that the

agency is unable to accommodate immediately. Front pay shall be paid for such period as the

agency is unable to hire, promote, or reinstate the employee to a position at the appropriate level

and as warranted by law.

(4) Front pay shall terminate upon acceptance or rejection of a position to which the employee has

been determined to be entitled.

(5) Front pay shall be available as a remedy in cases involving hiring, promotion, demotion, or

dismissal.

(6) Front pay shall be payable under the same conditions as back pay except that the only deductions

from front pay shall be for usual and regular deductions for state and federal withholding taxes and

the employee's retirement contribution. There may also be a deduction for other employment

earnings, whether paid by the state or another employer, so as to avoid unjust enrichment of the

grievant.

(7) Shift premium pay and holiday premium pay shall not be available on front pay.

History Note:

Authority G.S. 126-4(9); G.S. 126-34.02;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1308 is proposed to be adopted as follows:

25 NCAC 01J .1308 LEAVE

(a) An employee shall be credited on reinstatement with all vacation leave which would have been earned except for

the interruption in employment.

(b) An employee shall be credited on reinstatement with all sick leave which would have been earned except for the

interruption in employment.

(c) The decision as to whether or not to allow the reinstated employee to purchase back the vacation leave paid out

in a lump sum at dismissal is within the discretion of the agency. A failure to allow such repurchase is not grievable.

(d) Employees reinstated from dismissal shall have their former balance of sick leave at dismissal reinstated, in

addition to the credit for sick leave which would have been earned except for the dismissal.

History Note:

Authority S.L. 2013-382, sec, 6.1;

Temporary Adoption Eff. February 28, 2014;

25 NCAC 01J .1309 is proposed to be adopted as follows:

25 NCAC 01J .1309 HEALTH INSURANCE

Employees reinstated from dismissal shall be entitled to either retroactive coverage under the state health insurance plan or to reimbursement up to the amount the state contributes for employee only coverage. The employee shall have the right to elect between these two choices, provided that if the employee elects reimbursement the employee may do so only if the employee had secured alternate health insurance coverage during the period of interruption of employment. The employee shall not be reimbursed for the cost of coverage of dependents or spouse during the period between dismissal and reinstatement, but the employee may choose to purchase that retroactive coverage. It is the responsibility of the employee to provide proof of insurance or insured expenses incurred during the period of

unemployment.

History Note:

Authority S.L. 2013-382, sec, 6.1;

Temporary Adoption Eff. February 28, 2014;

25 NCAC 01J .1310 is proposed to be adopted as follows:

25 NCAC 01J .1310 INTEREST

The state shall not pay interest on any back pay award.

History Note: Authority G.S. 126-4(9).

Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1311 is proposed to be adopted as follows:

25 NCAC 01J .1311 REINSTATEMENT

When an employee who was dismissed or demoted is reinstated, the employee shall return to employment in the same position, or a similar position at management's option, at the same salary grade or salary grade equivalency which the employee enjoyed prior to dismissal.—The agency may reinstate an employee to a similar position assigned to a duty station that is in a different location than the prior assigned duty station. If the new duty station is 50 miles or more from the prior assigned duty station, then the agency may choose to pay moving and relocation

expenses in accordance with the policies of the Office of State Budget and Management.

<u>History Note</u>: <u>Authority G.S. 126-4(9); 126-34.02</u>

Temporary Adoption Eff. February 28, 2014;

25 NCAC 01J .1312 is proposed to be adopted as follows:

25 NCAC 01J .1312 CAUSES FOR REINSTATEMENT

For grievances filed on or after August 21, 2013, reinstatement from dismissal, suspension, or demotion may be

ordered only upon a finding of lack of substantive just cause (25 NCAC 01J .0604) or discrimination, harassment, or

retaliation prohibited by G.S. 126-16 and 126-34.02 or that an employee was dismissed, suspended, or demoted in violation of G.S. 126-34.02 because he or she was a whistleblower. For the purpose of this Rule, and in addition to

Totation of O.S. 120 5 1.02 because he of she was a winsheblower. For the purpose of this reale, and in addition to

those matters listed in Rule .0604 of this Subchapter, failure to issue the required number and kind of warnings or

other disciplinary actions prior to dismissal for unsatisfactory job performance shall also be considered to constitute

a lack of substantive just cause.

History Note:

Authority G.S. 126-4(9); 126-34.02; 126-35;

Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1313 is proposed to be adopted as follows:

25 NCAC 01J .1313 SUSPENSION WITHOUT PAY

For grievances filed on or after August 21, 2013, back pay shall be ordered in those cases in which it is determined that a suspension without pay lacked substantive just cause or was an act of discrimination, harassment, or retaliation prohibited by G.S. 126-16 or 126-34.02, or violated G.S. 126-34.02 because the employee was found to be whistleblower under Article 14 of Chapter 126 of the General Statutes.

History Note: Authority G.S. 126-4(6); 126-16; 126-34.02; 126-35; S.L. 2013-382;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1314 is proposed to be adopted as follows:

25 NCAC 01J .1314 DISCRIMINATION, HARASSMENT, OR RETALIATION

For grievances filed on or after August 21, 2013, back pay, transfer, promotion, or other appropriate remedies, including corrective remedies to ensure that the same or similar acts do not recur, may be ordered where discrimination, harassment, or retaliation in violation of G.S. 126-16 or 126-34.02 is found.

History Note: Authority G.S. 126-4(9); 126-16; 126-34.02;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1315 is proposed to be adopted as follows:

25 NCAC 01J .1315 VOLUNTARY PROGRAMS OR BENEFITS

Because voluntary programs or benefits (such as the 401K program, voluntary health and life insurance programs or

deferred compensation) are the choice of the employee and therefore employee's financial responsibility, such

voluntary programs or benefits are not addressed by any awards under these rules and Chapter 126. Retroactive

contributions or membership in any such program shall not be part of any remedy awarded to any employee. To the

extent that retroactive coverage or membership is available, the grievant is responsible for any action seeking to

obtain such benefits.

History Note:

Authority G.S. 126-4(9); 126-34.02;

 $Temporary\ Adoption\ Eff.\ May\ 23,\ 2014$

25 NCAC 01J .1316 is proposed to be adopted as follows:

25 NCAC 01J .1316 REMEDIES FOR PROCEDURAL VIOLATIONS

(a) Failure to give written notice of applicable appeal rights in connection with a dismissal, demotion or suspension

without pay shall be deemed a procedural violation. The sole remedy for this violation shall be an extension of the

time in which to file an appeal. The extension shall be from the date of the procedural violation to no more than 30

calendar days from the date the employee is given written notice of applicable appeal rights.

(b) Failure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural

violation. Back pay, attorney's fees, or both may be awarded for such a violation. Back pay or attorney's fees, or

both may be awarded for such a period of time as is appropriate under the law, considering all the circumstances.

(c) Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for

this violation shall require that the employee be granted back pay from the date of the dismissal until a date

determined appropriate in light of the purpose of pre-dismissal conferences, which is to provide notice to the

employee and an opportunity to be heard. Reinstatement shall not be a remedy for lack of a pre-dismissal

conference.

History Note:

Authority G.S. 126-4(9); 126-34.02; 126-35; S.L. 2013-382;

Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1317 is proposed to be adopted as follows:

25 NCAC 01J .1317 REMEDIES: SALARY ADJUSTMENTS

(a) No department, agency, or institution may use within-grade or within-range salary adjustments as a method of

resolving any grievance, contested case, or lawsuit without notice to the Office of State Human Resources and the

specific, written approval of the State Human Resources Director.

(b) Any within-grade or within-range salary adjustment to be approved by the State Human Resources Director

shall be in compliance with existing salary administration policies (see 25 NCAC 01D .0100 et seq.) or shall have

prior approval as an exception to or waiver from such policies in accordance with Rule 01A.0104 of this Title.

History Note:

Authority G.S. 126-4(2); S.L. 2013-283;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1318 is proposed to be adopted as follows:

25 NCAC 01J .1318 CERTAIN REMEDIES NOT AVAILABLE

<u>Punitive</u>, exemplary, and other special damages are not available as remedies in appeals brought under Chapter 126

 $\underline{of\ the\ North\ Carolina\ General\ Statutes,\ only\ solely\ compensatory\ relief,\ in\ the\ nature\ of\ back\ pay,\ front\ pay,\ or\ other}$

omitted benefits, along with attorney's fees in certain cases is available as remedies in appeal under Chapter 126 of

North Carolina General Statutes.

History Note:

Authority G.S. 126-4(9); 126-34.02.

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1319 is proposed to be adopted as follows:

25 NCAC 01J .1319 SITUATIONS IN WHICH ATTORNEY'S FEES MAY BE AWARDED

For grievances filed on or after August 21, 2013, attorney's fees may be awarded only in the following situations:

- (1) the grievant is reinstated;
- (2) the grievant is awarded back pay from either a demotion or a dismissal, without regard to whether the grievant has been reinstated; or
- (3) the grievant prevails in a whistleblower grievance.

History Note: Authority G.S. 126-4(11); G.S. 126-34.02;

Temporary Adoption Eff. May 23, 2014

25 NCAC 01J .1320 is proposed to be adopted as follows:

25 NCAC 01J .1320 ATTORNEY'S FEES MAY BE AWARDED AS A RESULT OF A SETTLEMENT

Attorney's fees may be paid as the result of a settlement in the grievance procedure, providing such fees are explicitly incorporated as a part of a written settlement agreement signed by both parties. Attorney's fees shall not be awarded as the result of a settlement unless such fees are a specific part of the written settlement agreement.

History Note: Authority G.S. 126-4(11); 126-34.01; 126-34-02;

Temporary Adoption Eff. May 23, 2014

SECTION .1400 - EMPLOYEE MEDIATION AND GRIEVANCE PROCESS

25 NCAC 01J .1401 MINIMUM PROCEDURAL REQUIREMENTS

- (a) Mediation involves the services of a neutral third person that assists an employee and an agency representative in resolving an employee grievance in a mutually acceptable manner.
- (b) In situations where mediation does not produce agreement or if a grievance involves an issue that the agency has identified as not subject to mediation, employees may present the grievance to a Hearing Officer or Hearing Panel within the agency. The Hearing Officer or Hearing Panel shall forward a recommendation to the Agency Head for a Final Agency Decision (FAD).
- (c) Employees may appeal the FAD to the Office of Administrative Hearings (OAH) where an Administrative Law Judge will render a recommended decision to the State Personnel Commission. The State Personnel Commission will issue a Final Decision and Order.
- (d) Grievances alleging discrimination may, at the grievant's choice, proceed either through the agency procedure or may proceed directly to the OAH. Complaints of unlawful workplace harassment shall proceed through the agency's Unlawful Workplace Harassment procedure as required by 25 NCAC 01J, .1100.

History Note: Authority G.S. 126-4(1); 126-4(9); 126-34; 126-34.1; 126-16; 126-34.2; 126-35; 126-36; 126-37;

126-38; 150B-23; Eff. March 1, 2005. 25 NCAC 01J.1402 is being proposed to be repealed as follows:

25 NCAC 01J .1402 FLEXIBILITY

Agencies shall have the flexibility to decide which grievable issues will not be subject to mediation. In addition, agencies may choose to mediate nongrievable issues by developing internal agency policies and procedures outside the scope of the rules in this Section. Agencies may utilize mediators serving in the OSP Mediator Pool, 25 NCAC 01J .1410, for mediating nongrievable issues. In such situations, OSP and the requesting agency shall work out a mutually acceptable process to access the mediator pool of resources.

History Note: Authority G.S. 126-4(9); 126-4(10);

Eff. March 1, 2005.

25 NCAC 01J.1403 is being proposed to be repealed as follows:

25 NCAC 01J .1403 INFORMAL MEETING WITH SUPERVISOR

For all grievable issues, the agencies shall encourage employees to first attempt to resolve a grievable issue with their immediate or other supervisor in the employee's chain of command.

History Note: Authority G.S. 126-4(9). 126-4(10);

Eff. March 1, 2005.

25 NCAC 01J .1404 MEDIATION PROCEDURE

- (a) Where an agency has designated an issue as subject to mediation, mediation is Step 1 in the Employee Mediation and Grievance Process. Mediation follows unsuccessful attempts by employees to resolve grievable issues with their immediate or other supervisor in the employee's chain of command. An employee must begin the grievance process by filing a grievance in accordance with the agency's grievance procedure. An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance or after unsuccessfully attempting to resolve the grievance informally, whichever is longer.
- (b) The Office of State Personnel (OSP) shall assign mediators to grievances. The mediation process shall be concluded within 45 calendar days from the filing of the grievance unless the parties agree in writing to a longer period of time.
- (c) Mediations shall be conducted in a location approved by the mediator and shall be scheduled for an amount of time determined by the mediator to be sufficient. Mediations may be recessed by the mediator and reconvened at a later time.
- (d) Only mediators in the OSP Mediation Pool, 25 NCAC 01J .1410, shall mediate grievances presented by state agency employees.
- (e) The following pertains to attendance at the mediation proceedings:
 - (1) A designated agency representative with the authority to reach an agreement shall attend on behalf of the agency.
 - (2) In situations where the selected mediator cannot attend the mediation, there must be an emergency substitution of a mediator. This substitution must be approved by the OSP Mediation Administrator or designee.
 - (3) OSP Mediation Administrator and designees may attend as observers.
 - (4) Representatives, advisors and attorneys are not permitted to attend.
 - (5) Audiotape, videotape or other automated recordings are not permitted.
- (f) Because mediation is Step 1 of the internal agency grievance process, attorneys are not permitted to participate directly in the process. However, because a mediation that resolves an employee's grievance will result in a Mediation Agreement, either party may ask for a recess at any time during the mediation in order to obtain legal advice regarding the terms of the Mediation Agreement.

History Note: Authority G.S. 126-4(9); 126-4(10); 126-4(17); 126-34; 126-35; Eff. March 1, 2005.

25 NCAC 01J.1405 is being proposed to be repealed as follows:

25 NCAC 01J .1405 CONCLUSION OF MEDIATION

- (a) At the end of mediation, the mediator shall prepare either a Mediation Agreement that is signed by the parties, or a statement that mediation did not result in resolution.
- (b) When mediation resolves a grievance, the following shall occur:
 - (1) Employee and agency representative sign a Mediation Agreement.
 - (2) Each party receives a copy of the signed Mediation Agreement.
 - (3) Mediation Agreements shall be maintained on file in the agency for not less than three years.
 - (4) Mediation Agreements shall not transfer to another agency if the employee transfers.
 - (5) Mediation Agreements shall be binding on both parties.
- (c) Mediation Agreements are considered public documents under G.S. 132 1.3.

History Note: Authority G.S. 126-4(9); 126-4(10); 126-4(17); Eff. March 1, 2005.

25 NCAC 01J .1406 LIMITATIONS ON A MEDIATION AGREEMENT

- (a) Parties to the mediation shall not enter into an agreement that would exceed the scope of their authority. The Mediation Agreement shall:
 - (1) serve as a written record;
 - (2) not contain any provision contrary to State Personnel Commission rules, and applicable state and federal law: and
 - (3) not be transferable to another state agency.
- (b) When mediation resolves a grievance but it is later determined that one or more provisions of the Mediation Agreement do not comply with State Personnel Commission rules, applicable state or federal law, the parties may return to mediation to resolve those issues that can be resolved by the parties.
- (c) Any resolution achieved through mediation, to the extent that it involves a grievance or a contested case issue, shall be treated as a settlement agreement and, as such, is subject to approval by the State Personnel Director and the State Personnel Commission as outlined in Rule .1412 of this Section.

History Note: Authority G.S. 126-4(9); 126-4(10); Eff. March 1, 2005.

25 NCAC 01J.1407 is being proposed to be repealed as follows:

25 NCAC 01J .1407 POST MEDIATION

- (a) Employees and supervisors who breach a mediated agreement may be subject to disciplinary action up to and including dismissal based on unacceptable personal conduct.
- (b) Except for the Mediation Agreement itself, all other documents generated during the course of mediation and any communications shared in connection with mediation are confidential to the extent provided by law.
- (c) When mediation does not result in agreement, the employee may proceed to Step 2, 25 NCAC 01J .1411(6) through (8), in the grievance process following written notice to the employee that mediation did not result in resolution of the grievance.

History Note: Authority G.S. 126-4(6); 126-4(7); 126-4(10); 126-34; Eff. March 1, 2005.

25 NCAC 01J.1408 is being proposed to be repealed as follows:

25 NCAC 01J .1408 EMPLOYEE RESPONSIBILITIES FOR MEDIATION

Each employee shall:

(1) make a good faith effort to mediate disputes;

2) attend mediations as scheduled by the agency; and

notify agency personnel in advance when circumstances prevent the employee from attending a scheduled mediation. Failure to make such an advanced notification shall cause the grievance to be dismissed.

History Note: Authority G.S. 126-4(9);

Eff. April 1, 2005.

25 NCAC 01J.1409 is being proposed to be repealed as follows:

25 NCAC 01J .1409 AGENCY RESPONSIBILITIES FOR MEDIATION

(a) Each agency shall:

- (1) administer the mediation program within the agency;
- (2) appoint an agency intake coordinator who will be responsible for organizing the mediation process;
- (3) determine suitable locations for conducting mediations;
- (4) ensure confidentiality of the mediation to the extent provided by law;
- (5) schedule only mediators from the OSP Mediation Pool for each mediation session;
- (6) reimburse mediators for travel and other expenses at state approved rates and covering any administrative costs associated with mediation;
- (7) designate management personnel, such as human resources personnel and legal counsel, to be available to answer questions that may arise during the mediation process;
- (8) designate agency representatives who will mediate in good faith and who will have the authority to reach an agreement on behalf of the agency to resolve a grievance;
- (9) submit data to OSP for the purpose of evaluating the mediation process for cost containment and resolution of grievances efficiently and effectively; and
- (10) submit to OSP a copy of all Mediation Agreements executed by the agency.
- (b) An agency employee designated to attend mediation on behalf of the agency shall notify agency personnel in advance when circumstances prevent the employee from attending a scheduled mediation. Failure to make such an advanced notification may subject the employee to disciplinary action.

History Note: Authority G.S. 126-4(6); 126-4(9); 126-4(10); Eff. April 1, 2005.

25 NCAC 01J.1410 is being proposed to be repealed as follows:

25 NCAC 01J .1410 OFFICE OF STATE PERSONNEL RESPONSIBILITIES

The Office of State Personnel (OSP) shall:

- (1) appoint the OSP Mediation Administrator as program manager;
- (2) develop an OSP mediator pool;
- (3) identify mediator training programs and resources; and
- (4) conduct on going studies/analysis to evaluate program effectiveness.

History Note: Authority G.S. 126-4(9); 126-4(10);

Eff April 1, 2005.

25 NCAC 01J .1411 AGENCY PROCEDURAL REQUIREMENTS FOR EMPLOYEE MEDIATION AND GRIEVANCE POLICY

The following are minimum procedures for an agency grievance process:

- (1) The agency grievance procedure shall state the issues that, in addition to those listed in G.S. 126 may be grieved at the agency level.
- (2) The agency grievance procedure shall list which issues are subject to mediation (Step 1) and which issues shall proceed directly to a grievance hearing (Step 2).
- (3) The agency grievance procedure shall encourage direct communication between employees and their immediate supervisor or other supervisor in the chain of command to attempt to resolve the grievance.
- (4) All decisions issued by the agency after the discussion between the employee and the immediate supervisor or other supervisor in the chain of command shall be in writing and a copy provided to the employee.
- (5) For those issues subject to mediation, the agency grievance process shall require both the employee and an agency representative to mediate a dispute by attending a scheduled mediation.
- (6) If mediation does not result in agreement, the employee is entitled to proceed to Step 2. The agency shall notify the employee within 10 days of the unsuccessful mediation of the option to present the grievance orally to a reviewer or reviewers outside of the chain of command, e.g., Hearing Officer or Hearing Panel.
- (7) The employee shall have the right to challenge whether the person, or body of persons outside of the chain of command review level, can render an unbiased recommendation. The agency procedure shall establish a process for the challenge as well as the procedure for selection of a replacement reviewer, when necessary.
- (8) The agency shall set up time limits for appeal and for the employee and the agency to respond to each other during the grievance procedure. The agency may not set any time limit for itself that is more than twice the time limit established for employees.
- (9) An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance unless the internal agency procedure provides for a longer period.
- (10) Neither party to the grievance shall be represented by attorneys or other persons during the internal agency grievance procedure or during any mediation procedure.

History Note: Authority G.S. 126-4(9); 126-4(10); 126-34.1(a); Eff. March 1, 2005.

25 NCAC 01J .1412 OFFICE OF STATE PERSONNEL RESPONSIBILITIES FOR EMPLOYEE MEDIATION AND GRIEVANCE PROCESS

The Office of State Personnel shall:

- (1) review each proposed Employee Mediation and Grievance Process for conformity with State Personnel Commission rules, and applicable state and federal law;
- (2) present the procedure to the State Personnel Commission for consideration and approval at its next available scheduled meeting; and
- (3) provide consultation and technical assistance to agencies as needed.

History Note: Authority G.S. 126-4(9); 126-4(10);

Eff. March 1, 2005.